

CLOSED

**U.S. District Court [LIVE]
Western District of Texas (San Antonio)
CIVIL DOCKET FOR CASE #: 5:13-cv-00495-XR**

Ducharme-Romero et al v. Chavarria
Assigned to: Judge Xavier Rodriguez
Cause: 28:1983 Civil Rights

Date Filed: 06/07/2013
Date Terminated: 01/09/2014
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff**Heather Ducharme-Romero**

represented by **Heather Ducharme-Romero**
12742 Cinco de Mayo
San Antonio, TX 78252
PRO SE

Plaintiff**Mark Romero**

represented by **Mark Romero**
12742 Cinco de Mayo
San Antonio, TX 78252
PRO SE

V.

Defendant**Chavarria***Deputy Sheriff, #1297*

represented by **Susan A. Bowen**
Bexar County District Attorney's Office
101 Nueva - 4th Flr
San Antonio, TX 78205
(210) 335-2147
Email: sbowen@bexar.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**Bexar County Sheriff Department***TERMINATED: 06/28/2013***Defendant****Bexar County**

represented by **Susan A. Bowen**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	clear	Docket Text
06/07/2013	1	<input type="checkbox"/>	MOTION to Proceed in forma pauperis by Heather Ducharme-Romero. (Attachments: # 1 Proposed Complaint and Civil Cover Sheet)(rf) Modified on 6/11/2013, to correct file date (rf). (Entered: 06/11/2013)
06/07/2013	2	<input type="checkbox"/>	MOTION to Proceed in forma pauperis by Mark Romero. (rf) (Entered: 06/11/2013)
06/07/2013			THIS CASE HAS BEEN ASSIGNED TO JUDGE XAVIER RODRIGUEZ (rf) (Entered: 06/11/2013)
06/07/2013			If ordered by the court, all referrals will be assigned to Magistrate Judge Mathy (rf) (Entered: 06/11/2013)
06/11/2013			MOTION REFERRED: referred 2 MOTION to Proceed in forma pauperis, 1 MOTION to Proceed in forma pauperis. Referral Judge: Pamela A. Mathy. (rf) (Entered: 06/11/2013)
06/12/2013	3	<input type="checkbox"/>	ORDER TO SHOW CAUSE as to Heather Ducharme-Romero, Mark Romero. IT IS ORDERED that plaintiffs' motions for leave to proceed in forma pauperis are HELD IN ABEYANCE. IT IS ALSO ORDERED that on or before Wednesday, June 26, 2013, plaintiffs must SHOW CAUSE why their requests for leave to proceed IFP should not be DENIED for the reason that plaintiffs' proposed complaint fails to state non-frivolous claims for relief. To respond to the order to show cause, plaintiffs must file a proposed amended complaint, not more than ten pages in length, that includes a particularized statement of facts to show: the specific federal constitutional or statutory rights at issue in each cause of action against each defendant; when each alleged cause of action arose; and the specific involvement of each defendant in the acts alleged in each cause of action. Plaintiffs are hereby advised that if they fail to file a timely response to the order to show cause, the District Judge may enter an order dismissing the case for failure to timely prosecute and/or failure to timely comply with a Court Order. See Fed.R.Civ.P. 41. Signed by Judge Pamela A. Mathy. (kh) (Entered: 06/12/2013)
06/26/2013	4	<input type="checkbox"/>	Proposed AMENDED COMPLAINT against Bexar County, Bexar County Sheriff Department, Chavarria amending, filed by Heather Ducharme-Romero, Mark Romero. (Attachments: # 1 Civil Cover Sheet)(kh) (Entered: 06/27/2013)
06/28/2013	5	<input type="checkbox"/>	ORDER - GRANTING IN PART AND DENYING IN PART 1 2 Motions for Leave to Proceed in forma pauperis. IT IS ORDERED that plaintiffs motions for leave to proceed in forma pauperis are provisionally GRANTED in part to permit plaintiffs provisionally to proceed IFP on § 1983 claims against Deputy Chavarria in his individual capacity for an alleged violation of plaintiffs Fourth and Fourteenth Amendment rights based on the Deputys alleged action in killing plaintiffs dog, and on § 1983 claims against Bexar County regarding plaintiffs official capacity claims against Deputy Chavarria for a violation of plaintiffs Fourth and Fourteenth Amendment rights based on the Deputys alleged action in killing plaintiffs dog; and other than the limited extent to which the IFP motions

			are provisionally granted, the IFP motions are DENIED without prejudice. IT IS ALSO ORDERED that plaintiffs amended complaint shall be filed by the Clerk without prepayment of fees, costs or the giving of security therefor, and the Clerk shall, until further Order of this Court, waive the collection of any other fees or costs from plaintiffs. IT IS ORDERED that, if not already accomplished, within ten (10) days of the date of this Order, plaintiffs shall submit to the Clerks Office a fully completed United States Marshal Service form 285, including fully complete addresses, for each defendant required to be served (Deputy Chavarria and Bexar County) and the United States Marshals Service shall serve each defendant with a copy of plaintiffs complaint, amended complaint, the June 12, 2013 order to show cause, and a copy of this order, by certified mail, return receipt requested. IT IS ALSO ORDERED that all matters informally referred to the undersigned having been addressed, this case is RETURNED to the District Court. Signed by Judge Pamela A. Mathy. (kh) (Entered: 06/28/2013)
06/28/2013			Motions No Longer Referred: 2 MOTION to Proceed in forma pauperis, 1 MOTION to Proceed in forma pauperis (kh) (Entered: 06/28/2013)
07/05/2013	6	<input type="checkbox"/>	Summons Issued as to Bexar County, Chavarria. (kh) (Entered: 07/10/2013)
07/10/2013			Remark - USM-285 Form, together with Summons; copy of Plaintiff's complaint (Docket Entry No. 1), amended complaint(Docket Entry No. 3); the June 12, 2013 Show Cause Order(Docket Entry No. 4) and a copy of the June 28, 2013 Order (Docket Entry No. 5) forwarded to US Marshal's for service on Defendants Deputy Sheriff FNU Chavarria and Bexar County, Texas on 7/10/2013. (kh) (Entered: 07/10/2013)
08/02/2013	7	<input type="checkbox"/>	MOTION to Dismiss <i>Bexar County Deputy Sheriff Chavarria and Bexar county Texas' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and Supporting Brief Based on Qualified Immunity and Failure to State a Claim</i> by Bexar County, Chavarria. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit) (Bowen, Susan) (Entered: 08/02/2013)
08/28/2013	8	<input type="checkbox"/>	SUMMONS Returned Executed by Heather Ducharme-Romero. Bexar County served on 7/12/2013, answer due 8/2/2013. (rg) (Entered: 08/29/2013)
09/09/2013	9	<input type="checkbox"/>	Pro Se MOTION for Extension of Time by Heather Ducharme-Romero, Mark Romero. (kh) (Entered: 09/09/2013)
09/10/2013			Text Order GRANTING 9 Motion for Extension of Time to File Response/Reply entered by Judge Xavier Rodriguez. Plaintiffs are granted an extension of time until October 10, 2013, to have an attorney file an appearance in this case. Any response to the Motion to Dismiss (Doc. No. 7) shall be due 14 days after the attorney files his or her appearance. If Plaintiffs do not obtain counsel, the response will be due on October 10, 2013. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ct) (Entered: 09/10/2013)
12/05/2013	10	<input type="checkbox"/>	ORDER Plaintiffs to file a response by 1/6/14, re 7 MOTION to Dismiss. Signed by Judge Xavier Rodriguez. (rf) (Entered: 12/05/2013)

01/09/2014	11	<input type="checkbox"/>	ORDER GRANTING 7 Motion for Summary Judgment. Signed by Judge Xavier Rodriguez. (rf) (Entered: 01/09/2014)
01/09/2014	12	<input type="checkbox"/>	CLERK'S JUDGMENT (rf) (Entered: 01/09/2014)

in forma pauperis

AO 240 (Rev. 01/09) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

District of _____

2013 JUN -7 P 5:12

U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXASBY: 109
DEPUTYHeather Ducharme-Romero / 11 m, 1?

Plaintiff

v.

Deputy Sheriff Chararria #1297, et al

Defendant

Civil Action No.

SA13CA0495 XR

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS
(Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. If incarcerated. I am being held at: N/A

If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. If not incarcerated. If I am employed, my employer's name and address are:

My take-home pay or wages are: \$ per (specify pay period) .

3. Other Income. In the past 12 months, I have received income from the following sources (check all that apply):

- | | | |
|--|------------------------------|--|
| (a) Business, profession, or other self-employment | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| (b) Rent payments, interest, or dividends | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| (c) Pension, annuity, or life insurance payments | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| (d) Disability, or worker's compensation payments | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| (e) Gifts, or inheritances | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| (f) Any other sources | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

AO 240 (Rev. 01/09) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

4. Amount of money that I have in cash or in a checking or savings account: \$ _____.

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name (*describe the property and its approximate value*):

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: 6/7/13

Heather Ducharme-Romero
Applicant's signature

Heather Ducharme-Romero
Printed name

RECEIVED

JUN - 7 2013

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY NY DEPUTY CLERKCOMPLAINT
FEDERAL COURTPlaintiff: Heather Ducharme-Romero
Mark Romero

SA13CA0495XR

12742 Cinco de Mayo, San Antonio, Tx, 78252

Defendant: Sheriff Chavarria #1297 (~~Deputy Sheriff~~ ^{HDR})

Bexar County

Bexar County Sheriff Department

200 N. Comal

- 3) The occurrence happened in Bexar County, and is therefore the jurisdiction.
- 1) Violated our 1983 civil rights action
 - 2) Violation of 4th Amendment Rights
 - 3) Unlawful entry of property
 - 4) damage to property
 - 5) Taking the life of our dog

Relief Requested

I am not sure. Possibly seeking monetary compensation and reprimandation of all responsible parties.

Heather Ducharme-Romero

6/7/13

Mark Romero

6/7/13

12742 Cinco de Mayo
San Antonio, Tx
78252

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Heather Ducharme-Romero
Mark Romero

(b) County of Residence of First Listed Plaintiff

Bexar

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

12742 Cinco de Mayo
SA, TX 78252

pro se

210-363-1478

DEFENDANTS

Deputy Sheriff Chavarria Badge # 1297
Bexar County Sheriff Department
Bexar County

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

SA13CA0495XR

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

☐ 1 U.S. Government Plaintiff☒ 3 Federal Question
(U.S. Government Not a Party)☒ U.S. Government Defendant☐ 4 Diversity

(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State

☐ 1 PTF ☐ 1 DEF

Incorporated or Principal Place of Business In This State

☐ 4 PTF ☐ 4 DEF

Citizen of Another State

☐ 2 PTF ☐ 2 DEF

Incorporated and Principal Place of Business In Another State

☐ 5 PTF ☐ 5 DEF

Citizen or Subject of a Foreign Country

☐ 3 PTF ☐ 3 DEF

Foreign Nation

☐ 6 PTF ☐ 6 DEF

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input checked="" type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

☒ 1 Original Proceeding☐ 2 Removed from State Court☐ 3 Remanded from Appellate Court☐ 4 Reinstated or Reopened☐ 5 Transferred from another district (specify)☐ 6 Multidistrict Litigation☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

1983 Civil Rights Action & violation of 4th Amendment Right

Brief description of cause:

Unlawful entry of property, property damage and taking life of dog

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint

JURY DEMAND:

☐ Yes ☐ No

VIII. RELATED CASE(S)

IF ANY

(See instructions):

JUDGE

Heather Ducharme-Romero
Mark Romero

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

MJ-PM

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

MARK ROMERO and
HEATHER DUCHARME-ROMERO,

Plaintiffs,

v.

BEXAR COUNTY and
DEPUTY SHERIFF CHAVARRIA,

Defendants.

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Civil Action No. SA-13-CA-0495-XR

ORDER

On this date, the Court considered Defendant's motion for summary judgment. Doc No.

7. After careful consideration, the Court GRANTS the motion and DISMISSES the case.

BACKGROUND

This case arises out of allegations that Defendant Deputy Sheriff Chavarria unlawfully shot and killed Plaintiffs' pet dog. On the evening of June 7, 2011, Deputy Chavarria responded to a 911 call while on a routine patrol. The call had been placed by several individuals who claimed that they had been threatened by a man with a firearm during an altercation following a day of swimming on the Medina River. Upon arriving at the scene, Deputy Chavarria and several other officers ascertained the identity of the allegedly armed assailant: Plaintiff Mark Romero. The officers, acting on information obtained at the scene, then proceeded to Mr. Romero's home. Deputy Chavarria and his colleagues acknowledge noticing a "Beware of Dogs" sign but nonetheless entered Plaintiffs' fenced-in property. As the police officers

approached the house, four dogs charged them.¹ Fearing for his safety, Deputy Chavarria shot one of the dogs. Doc. No. 7, Ex. A. Thereafter, Plaintiff Mark Romero was taken into custody and charged for his involvement in the earlier altercation.

Plaintiffs' Amended Complaint alleges that Deputy Chavarria and the Bexar County Sheriff's Department violated various constitutional rights when they unlawfully entered Plaintiffs' property and killed their dog. Doc. No. 4. Specifically, Plaintiffs allege that their dog, Licker, posed no threat to Deputy Chavarria and that therefore their property was seized unlawfully in violation of the Fourth and Fourteenth Amendments. On August 2, 2013 Defendants filed this motion to dismiss, or in the alternative, for summary judgment. Doc. No. 7. After granting pro se Plaintiffs an extension of time to respond and to engage an attorney, on December 5, 2013, this Court granted the motion to dismiss with respect to Defendant Bexar County because Plaintiffs had failed to state a *Monell* claim against the County. Doc. No. 10.

With respect to the motion for summary judgment, Defendants had attached affidavits as evidence that Deputy Chavarria acted with objective reasonableness and was therefore entitled to qualified immunity. However, the Court found that it was premature to grant summary judgment on the individual capacity claims against Deputy Chavarria until pro se Plaintiffs had been given time to produce competent evidence showing that a genuine fact issue existed. Accordingly, Plaintiffs were ordered to provide evidence establishing a fact issue on or before January 6, 2014. *Id.* As of January 9, 2014, Plaintiffs have not provided any evidence that contradicts Deputy Chavarria's version of the events.

¹ The Amended Complaint alleges that Deputy Chavarria shot Licker through the right rear thigh as the dog attempted to run away, thereby posing no reasonable threat to the officers. Doc. No. 4. In addition, Plaintiffs allege that Deputy Chavarria behaved in an unprofessional and unbecoming manner by taunting them about their dead pet in front of their children. If true, these allegations reflect poorly on Deputy Chavarria. However, Plaintiffs have not provided any evidence to corroborate their claims.

LEGAL STANDARD

Summary judgment is proper when the evidence shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986). Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails . . . to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court must draw reasonable inferences and construe evidence in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Although the evidence is viewed in the light most favorable to the nonmoving party, a nonmovant may not rely on “conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence” to create a genuine issue of material fact sufficient to survive summary judgment. *Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854, 860 (5th Cir. 2004).

DISCUSSION

Deputy Chavarria’s primary argument is that the suit is barred by qualified immunity. Government officials performing discretionary functions are protected from civil liability under the doctrine of qualified immunity if their conduct violates no “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether qualified immunity applies, the courts apply the two-part test established in *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). Under this framework, the Court decides: “(1) whether facts alleged or shown by plaintiff make out the violation of a constitutional right, and

(2) if so, whether that right was clearly established at the time of the defendant's alleged misconduct.” *Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009).²

“The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 410 (5th Cir. 2009) (quoting *Saucier*, 533 U.S. at 202). When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). Qualified immunity is not only a defense to liability but also a immunity from suit. *Pearson*, 555 U.S. at 223. Thus, the Supreme Court has generally directed courts to resolve the issue before permitting discovery. *Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987).

Deputy Chavarria does not argue that the killing of a pet cannot constitute a constitutional violation.³ Instead, Deputy Chavarria argues that he has satisfied the second prong of the *Saucier v. Katz* test because his conduct was objectively reasonable under the circumstances. With respect to this inquiry, courts are directed to look at the facts and circumstances “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and courts “must account for the difficult and often split-second decisions that police officers must make in carrying out their duties.” *Lytle v. Bexar County, Texas*, 560 F.3d 404, 411 (5th Cir. 2009).

² If the answer to either of these questions is “no” then qualified immunity applies.

³ Circuit courts routinely find that the killing of an individual’s pet can constitute a seizure within the meaning of the Fourth Amendment. *Andrews v. City of West Branch*, 454 F.3d 914, 918 (8th Cir. 2006) (holding that police officer’s shooting of pet dog can constitute a seizure under the Fourth Amendment); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir.), *cert. denied*, 546 U.S. 1061 (2005); *Altman v. City of High Point, N.C.*, 330 F.3d 194, 204-05 (4th Cir. 2003) (holding that animal control officers’ actions of killing owner’s dogs constituted a “seizure” of the owner’s “effects” under the Fourth Amendment); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210-11 (3d Cir. 2001) (same); *Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009) (holding that killing of pet cats and dogs constituted a seizure under the Fourth Amendment); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008).

Based on Deputy Chavarria's affidavit, it would appear that his conduct was objectively reasonable.⁴ It is undisputed that when Deputy Chavarria arrived at Plaintiffs' residence, he had reason to believe that Plaintiff Mark Romero was armed and dangerous. Upon approaching the house, Deputy Chavarria testified that "several large dogs ran out aggressively charging, barking and growling, at Deputy Phillips and me (sic)." Doc. No. 7, Ex. A. He further testified that he acted only in the interest of his own safety and that of Deputy Phillips. It is objectively reasonable for an officer to shoot a dog that he reasonably believes poses a threat. *See, Altman v. City of High Point, N.C.*, 330 F.3d 194, 206 (4th Cir. 2003) (Officer's conduct was objectively reasonable when he shot several dogs that were running towards him). In addition, Deputy Phillips has corroborated Deputy Chavarria's claim that he acted in self-defense when he shot the dog. Doc. No. 7, Ex. B. Since Plaintiffs have not offered any evidence to contradict this version of the events, there is no factual dispute that precludes Deputy Chavarria from enjoying qualified immunity on the individual capacity claim.⁵

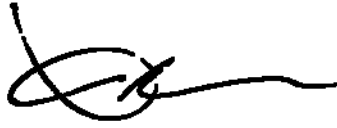
CONCLUSION

In light of the foregoing analysis, Defendant's motion for summary judgment is GRANTED. Doc. No. 7. The Clerk is directed to CLOSE this case and issue a judgment that Plaintiffs take nothing on their claims, which are hereby DISMISSED ON THE MERITS. Defendant is awarded costs of court and shall file a Bill of Costs in accordance with the local rules.

⁴ Although the Amended Complaint paints a different picture of the events, it is unsworn and therefore does not constitute competent summary judgment evidence.

⁵ In a similar case involving the police shooting a dog, a court in this district declined to grant summary judgment when the parties offered differing views of the danger the dog posed to the officer. *Kincheloe v. Caudle*, A-09-CA-010 LY, 2009 WL 3381047 (W.D. Tex. Oct. 16, 2009). Unlike in *Kincheloe*, Plaintiffs here have not offered competent evidence showing a fact issue exists as to what danger their dog posed to Deputy Chavarria.

SIGNED this 9th day of January, 2014.

A handwritten signature in black ink, consisting of a large, stylized 'X' followed by a horizontal line and a small flourish.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE